

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 5, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP487  
STATE OF WISCONSIN**

Cir. Ct. No. 2012CV1328

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN EX REL. THOMAS DOMINA,**

**PETITIONER-APPELLANT,**

**V.**

**WAYNE WIEDENHOEFT, ACTING ADMINISTRATOR, DIVISION OF  
HEARINGS AND APPEALS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Waukesha County:  
JENNIFER L. WESTON, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Thomas Domina appeals from a circuit court order denying his petition for a writ of certiorari contesting the revocation of his probation. He challenges as unreasonable the Division of Hearings and Appeals' determination that Domina violated his supervision rules by failing to disclose to

his agent his incidental contact with a minor child in a restaurant bathroom. We conclude that the revocation decision was supported by substantial evidence and was not arbitrary or capricious. We affirm.

¶2 In 2000, Domina pled to two counts of second-degree sexual assault of a child. The victim was a five-year-old boy. The circuit court imposed a prison sentence on one count. On the other, the court imposed but stayed a twenty-year prison sentence in favor of twenty years of concurrent probation. In 2005, following his release from prison, Domina's parole was revoked when the Department of Corrections discovered that he had engaged in and lied to his agent about an unapproved sexual relationship with a married woman. Domina was released back into the community in 2006 and immediately violated his supervision rules by threatening his agent and refusing to cooperate with sex offender treatment (SOT). He was taken back into custody and eventually released with an electronic monitoring program (EMP) bracelet in place. That same day, he failed to return to his residence and cut off the EMP bracelet. He also rejected the Department's transitional living placement and refused to provide a written statement. As a result, Domina received his first alternative to revocation (ATR), which consisted of six months in jail. A few months after completing the ATR, Domina was discovered in the bed of a low-functioning adult offender.<sup>1</sup> The Department responded by imposing a no-contact order between the men. A few months later, during a polygraph examination, Domina disclosed fourteen new rules violations. The Department increased its restrictions on his activity. Domina appeared to do well for more than a year but was then

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<sup>1</sup> Domina previously revealed to the Department that he had approximately twenty male victims who ranged in age from five to seventeen years old.

discovered in a room with the same low-functioning offender. Domina received a warning, and another year of supervision passed without incident. In 2010, when faced with another polygraph examination, Domina admitted to a variety of violations, including possessing several R-rated movies, having sexual contact with the previously mentioned low-functioning offender, and taking advantage of that offender's "immaturity" as part of a grooming process. As a consequence, Domina was offered and accepted a second ATR, this time to a six-month institutional SOT program. After completing the ATR, Domina failed to comply with his community-based SOT, and in December 2010, agreed to a third ATR requiring additional community-based SOT programming.

¶3 In July 2011, Domina provided a written statement to his agent revealing that over one year earlier, he used a urinal in a public restroom while next to a boy who appeared to be about ten years old. While investigating this incident, the agent discovered that Domina had used a computer to set up car insurance and to send several personal emails. Revocation was initiated based on the following five alleged violations: (1) unapproved contact with a minor based on the restroom incident; (2) failure to disclose the unapproved minor contact to his agent; (3) using a computer for unauthorized purposes; (4) failing to accurately disclose the unauthorized computer use; and (5) possession of an unapproved computer flash drive.

¶4 At Domina's probation revocation hearing, the administrative law judge (ALJ) found that the Department failed to prove the first violation because Domina's unapproved minor contact in the restroom was "purely incidental face-to-face contact during which Domina was accompanied by his Department-approved chaperone ...." However, the ALJ found that Domina had committed the second violation by failing to disclose the incidental contact to his agent in any

of their weekly meetings after the incident. The ALJ rejected as “not credible in the least” Domina’s assertion that he thought he did not have to disclose the incidental restroom contact, reasoning that Domina had been on probation for eight years based on his sexual assault of a minor boy, the contact involved Domina and the minor using adjacent urinals with their penises exposed, and his agent had asked each subsequent week whether there had been any minor contact.

¶5 The ALJ also found that the Department proved violations three and four involving Domina’s unauthorized computer use and failure to disclose that use.<sup>2</sup> The ALJ found incredible Domina’s argument that he believed the computer use was work-related, and rejected the notion that a string of emails with a church member should be excused because they were evidence of a positive support system:

I reject Domina’s attempt to characterize the above-described computer use as work-related. While it was not nefarious in nature, it was also not legitimately in furtherance of job searching. Domina could and should have simply asked his agent for specific permission to use a computer to find a vehicle and insurance. Likewise, he could and should have simply asked his agent for permission to use email to communicate with members of his network of support from [the] church. Finally, with respect to the cell phone joke forward from someone he knew through Workforce Development, he could and should have declined to respond and reported the email to his agent.... Instead, he denied any non-work computer use on a weekly basis. This also violated his rules as alleged.

The ALJ determined that in light of Domina’s prior supervision adjustment, these were serious violations because they “represented disregard for the rules and a

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<sup>2</sup> The ALJ found that the Department failed to establish the fifth violation involving the computer flash drive.

slippery slope toward further non-approved computer use.” The ALJ emphasized that Domina “significantly compounded the seriousness of [the computer] violation by hiding it from the Department on a weekly basis [.]” explaining that “[i]t is crucial to Domina’s rehabilitation that he takes responsibility for violations, no matter how minor he might perceive them, and that he maintains honesty.”

¶6 The ALJ concluded that in the context of Domina’s offense and supervision history, the three violations “warrant revocation to prevent undue depreciation of their seriousness and to protect the public:”

As the department pointed out, without transparency and honesty from Domina, the Department has no way to truly address his needs and risks, which is essential to keeping the public safe. Neither sex offender treatment nor supervision can be effective when an offender refuses to be honest and minimizes his violations; and when sex offender treatment and supervision are not effective, the public is at risk. Domina’s ongoing conduct demonstrates he has no intention of honesty. The instant violations are a further example of him coming clean only when faced with a polygraph.

¶7 The ALJ’s decision was sustained on administrative review, and upon certiorari review in the circuit court. Both reviewing bodies emphasized that the ALJ’s decision relied on the extensive and specific record facts and demonstrated a rational process leading to a reasonable decision.<sup>3</sup> On appeal,

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<sup>3</sup> The Division of Hearings and Appeals Administrator observed that “as indicated in the underlying decision, Domina would not be facing revocation if these were his first violations. Unfortunately, he has a lengthy history of skirting his rules and testing the limits of supervision.” The circuit court noted that “[w]hile all of the violations, even taken as a whole, can be viewed in a vacuum as de minimus and not worthy of revocation, the ALJ’s decision is a thorough and exhaustive recitation of Domina’s history on probation.... The historical facts, coupled with the current rule violations, support the Department’s decision to revoke.”

Domina contends that the ALJ erred in finding that his failure to report the minor conduct in the public restroom was a rule violation.

¶8 On certiorari review of an administrative decision revoking probation, we review the decision of the agency, not that of the circuit court. *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997). Our review of the agency's decision is limited to four inquiries: (1) whether it stayed within its jurisdiction; (2) whether it acted according to law; (3) "whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment"; and (4) whether the evidence was such that the division could reasonably arrive at its decision. *Id.* An agency's decision is not arbitrary or capricious if it constitutes a proper exercise of discretion. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64-65, 267 N.W.2d 17 (1978).

¶9 Domina has not met his burden to prove that the revocation decision was either arbitrary and capricious or unsupported by the evidence. *See State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976). Domina's arguments focus solely on the failure to report minor contact violation, but there was ample support for the revocation decision based solely on his unauthorized computer use and subsequent failure to disclose it to his agent. *See State ex rel. Cutler v. Schmidt*, 73 Wis. 2d 620, 622, 244 N.W.2d 230 (1976) (a violation of any condition of supervision constitutes sufficient grounds for probation revocation). The ALJ determined that Domina's asserted justifications for his computer use violations were neither credible nor sufficient, and explained why revocation was warranted:

The record evidences that Domina has violated time after time, for which he received numerous and various sanctions ... yet none have deterred him from continuing to justify, minimize and hide his rule violations. It is surely

because of Domina's substantial stayed prison sentence that the Department has demonstrated such leniency in the past.... At this point, however, the second chances must come to an end. This is necessary both to impress upon him the seriousness of his continued violations and to protect the public from the risk of his re-offense.

When viewed in light of Domina's offense history and adjustment on supervision, the decision to revoke was well-considered and logical, not arbitrary and capricious. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (an appropriate exercise of discretion reflects "a reasoning process based on the facts of record and a "conclusion based on a logical rationale founded upon proper legal standards."") (citation omitted).

¶10 Though not necessary to our decision, we further conclude that the ALJ could reasonably determine that Domina's failure to report the minor contact incident constituted a rule violation. *See id.* ("[i]f substantial evidence supports the division's determination, it must be affirmed even though the evidence may [also] support a contrary determination."). Here, the ALJ concluded:

Domina's agent asked him on a weekly basis after the incident contact whether he had any minor contact since his last appointment, which Domina always denied. That was not truthful. Had the agent asked whether he had any *unapproved* minor contact, Domina would have been justified in answering "no." However, the agent's weekly inquiries related to *any* minor contact, not just contact that was unapproved. Therefore, Domina should have disclosed the restaurant bathroom incident and it was a violation not to do so.

The ALJ's determination was supported by the record:

[Agent]: In your weekly appointment with your agents were you questioned about any minor contact that would be either incidental, that would be outside of incidental, or any minor contact in general?

[Domina]: Yes.

[Agent]: And what was your routine response to that question dating back to January, 2010?

[Domina]: When I, when I, if I were, happened to have an incidental minor, minor contact in a store situation I would tell my agent.

[Agent]: Well, this individual incident was never reported to your agent until you were more or less pressured into giving that statement, correct?

[Domina]: Because in my mind I had a supervising adult watching my every move and it wasn't an incidental contact because I had a person looking over my shoulder.

[Agent]: Okay. When I took your written statement, provided on July 14<sup>th</sup>, we discussed potential violations, correct?

[Domina]: [inaudible].

[Agent]: Why would you address a minor contact that was within the context of your chaperone or while in the presence your chaperone within that statement if you didn't feel it was a violation?

[Domina]: If it's the only situation that I could come up with that would answer the question you gave me.

[Agent]: Which would have been the question of have you had any minor contact?

[Domina]: Correct.

¶11 The ALJ found incredible Domina's assertion that he did not think he had to disclose the restroom incident. We defer to the agency's credibility findings and to its determination concerning the weight of the evidence. *George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. Given Domina's offense history, prior supervision experience and violations, and previous responses to agent questioning, and considering the nature of the incidental contact, the ALJ's conclusion was reasonable. *See id.* (we determine only whether reasonable minds could arrive at the conclusion reached by the division).



*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5. (2011-12).

